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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 40

WILLIAM HOAG,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW JERSEY

BRIEF FOR PETITIONER

ROBERT E. KNOWLTON,
Camden, New Jersey,
Counsel for Petitioner.

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Opinions Below

The opinion of the Supreme Court of New Jersey affirming, upon appeal, the conviction of petitioner appears at 21 N.J. 496, 122 A. 2d 628. The opinion is set forth in the record commencing at R. 200. The dissent starts at R. 208. The opinion of the Superior Court appears at 35 N.J. Super. 555, 114 A. 2d 573 (App. Div.) and is reproduced at R. 13.

Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S. Code, Sec. 1257 (3), to review the final judgment of the Supreme Court of New Jersey rejecting petitioner's claim that he is imprisoned in violation of the due process clause of the Fourteenth Amendment. Petitioner's motion for leave to proceed *in forma pauperis* and his petition for certiorari were granted on November 13, 1956 (R. 219).

Questions Presented

1. Does a verdict of acquittal show that the State failed to prove the defendant was one of the robbers when the defendant was acquitted after a trial in which:

(a) three indictments, each alleging the robbery of a different individual, arising out of the same transaction were joined for trial;

(b) each victim testified unequivocably and without contradiction to each of the elements of the crime against him, and this mutually corroborative testimony was fortified still further by the testimony of two additional witnesses as to the facts of the transaction;

(c) the issue of defendant's identity as one of the robbers was the only disputed fact at the trial and was also the only issue both common and conclusive upon all three indictments;

(d) the issue of identity was raised by the unequivocal statement of three of the State's five witnesses that defendant was not one of the robbers and by the refusal of a fourth to so identify him under oath, as well as by the defendant's testimony as to alibi; and,

(e) the jury acquittal was for each of the three indictments tried?

2. May a state court, consistently with the Fourteenth Amendment, try, convict and sentence an individual to 5-7 years for armed robbery where:

(a) the defendant had been acquitted upon three other indictments, joined for trial, arising out of the same criminal transaction;

(b) the State, although it knew from the day of the robbery that the victim named in the present indictment had been robbed, destroyed the possibility of joinder of all indictments for trial by failing to bring the present one until after the acquittal upon the first three;

(c) the acquittal at the first trial was based upon a determination that the defendant was not one of the robbers, and the victim named in the present indictment was robbed by the same men;

(d) the sole evidence identifying defendant as one of the robbers was the testimony of the victim whose testimony was not believed in the first trial; and,

(e) the trial occurred more than 29 months after the first trial, and over four years after the transaction, because the State, after the first trial, surrendered jurisdiction over the defendant by extraditing him to New York for incarceration?

Statute and Rules Involved

The robbery statute in force at the time of the robbery is set forth in Appendix, p. 33. Also included in the Appendix, p. 33, are the New Jersey rules on joinder.

Statement

The first trial.

On June 26, 1951, the Bergen County Grand Jury re turned three indictments against petitioner, William Hoa Each indictment alleged that on September 20, 1950, in th Borough of Fairview, New Jersey, petitioner, in conce with John Doe and Richard Roe, took property from specified individual by means of putting that person fear. A second count in each indictment charged the carr ing of a concealed weapon (R. 1-3).

These indictments were joined for trial and were trie on May 26 and 27, 1952 (R. 10). At this trial the Sta called five witnesses (R. 5). Three of these witnesses we the victims named in the indictments. The two other Sta witnesses were also victims of the robbery. One of the was Elmer Yager, the victim who was named in the four indictment, which was the subject of the second trial (4).

The testimony of these witnesses establishes, witho contradiction, that they all were in Gay's Tavern sometin after three o'clock on the afternoon of September 20, 195 and that a robbery took place at that time (R. 19-20; 4 51-52; 54; 57). It is equally well established that the were three robbers (R. 44; 54; 57-58) and that the victi were first required to line up against the wall and we then taken to another room where they were tied up (20-21; 44-45; 53; 54; 58). All witnesses, including the vi tims named in the indictments being tried, testified to t elements of robbery—i.e. that they were put in fear a that as a result of that fear, property was taken from the persons (R. 21; 44-45; 53; 54-55; 58). Consistent with t theory of a joint operation by three robbers as alleged the indictments, the witnesses referred to the robbers "they" without any attempt to specify that a given robb

did any particular act in relation to a specified victim—i.e. "they" lined the victims against the wall; "they" took the property and "they" tied up the victims (R. 20-21; 45; 53; 54; 58). The robbery statute involved specifically provided for the conviction of "aiders, procurers and abettors" (Appendix, p. 33) and it was clearly the theory of the State that the defendant, William Hoag, would be guilty if he was one of the three robbers who took part in the holdup.

The only disputed fact at this trial was the identification of petitioner as a participant. This was conceded upon argument before the Supreme Court of New Jersey herein (R. 210). Actually, three of the State's witnesses stated unequivocally that Hoag, the petitioner herein, was not one of the robbers (R. 46; 53; 55). A fourth witness stated on direct examination that he was not positive in his identification (R. 22) and upon cross-examination that he was not prepared to swear that Hoag was one of the robbers (R. 23). As a consequence, the only witness to identify Hoag was Elmer Yager (R. 58). The defendant, who did not call any other witnesses, testified that on September 20, 1950, he was at his mother-in-law's home (R. 89), that he had never been in Fairview, New Jersey (R. 92), that he had never been in Gay's Tavern (R. 92), and that he did not participate in the robbery of September 20, 1950 (R. 92). The jury acquitted upon all three indictments (R. 5-6).

The second trial.

Elmer Yager, the witness in the above trial, had filed a statement with the police on the day of the robbery (R. 157). In spite of its knowledge that Yager was a victim, the State did not return an indictment alleging the robbery from him until after the acquittal of May 27, 1952. On July 17, 1952, the Bergen County Grand Jury returned an in-

dictment which was the same as the first three in all respects except that this indictment alleged that Elmer S. Yager was robbed, and the description of the property taken was, of course, different (R. 4, 10). The State, however, after the first trial elected to extradite petitioner to New York for incarceration (R. 202). In addition, after return from New York, petitioner was incarcerated in the Bergen County Jail for five months awaiting trial (R. 189). As a result, trial upon the fourth indictment was delayed until October 18 and 19, 1954 (R. 10) which was over four years after the event and 29 months after the first trial.

At this second trial, the sole evidence that petitioner was one of the robbers was once again the testimony of Elmer S. Yager (R. 114). The State called no other witness except on rebuttal (R. 195). The defense called the other four witnesses who had testified for the State in the first trial. These witnesses once again stated either that petitioner was not one of the robbers (R. 137; 149; 151), or, that the witness could not make a positive identification (R. 143). Petitioner once again testified that he had never been in Fairview, New Jersey (R. 160-161) and that on September 20, 1950, he was in the midtown section of Manhattan with his mother-in-law (R. 162) who had died during the State induced delay between trials (R. 183).

The jury convicted petitioner of the robbery of Elmer S. Yager and of carrying a concealed weapon. Judgment and sentence upon this verdict were entered November 5, 1954 (R. 7). The petitioner was sentenced to 5-7 years for robbery and to a consecutive sentence of 1½-3 years for carrying a concealed weapon (R. 7). The sentence for carrying a concealed weapon was set aside December 17, 1954 (R. 8), because that count was barred by double jeopardy in that similar counts in the first trial had been dismissed (R. 10).

Appellate Review.

The defendant appealed as an indigent to the New Jersey Superior Court (R. 11). The case was heard upon a stipulated statement in lieu of record (R. 1-12) and the conviction was affirmed (R. 13), 35 N.J. Super. 555, 114 A. 2d 573 (App. Div. 1955). On appeal to the Supreme Court of New Jersey, that Court on its own motion ordered a transcript of the testimony at both the trials (R. 209-210). With the aforementioned stipulation and transcripts before it, that Court expressly denied defendant's claim that the trial, conviction and sentence herein deprived petitioner of his liberty without due process of law (R. 208).

Specification of Errors

The Supreme Court of New Jersey erred:

1. In failing to conclude that the verdict of acquittal in the trial of May 26 and 27, 1952, was a result of the State's failure to identify petitioner as one of the robbers in the criminal transaction which gave rise to all four of the indictments involved herein.

2. In holding that the trial of October 18 and 19, 1954, and the conviction and sentence therein, did not deprive petitioner of his right to due process of law under the Fourteenth Amendment.

Summary of Argument

A conviction obtained by multiple trials is a denial of due process where the second trial violates a sense of fundamental justice. *Palko* v. *Connecticut,* 302 U.S. 319.

The facts in the record show that the victims named in three indictments in the first trial and Elmer S. Yager, the victim alleged in the second trial, were robbed by the same three men. Five witnesses, including the three alleged

in the indictments being tried and Yager, testified without contradiction to the facts of the holdup and to each element of robbery in relation to the crime against them. Three, however, stated unequivocally that petitioner was not the robber and one said that he could not swear to such an identification; only Yager identified petitioner as a participant. Defendant testified as to alibi. The State conceded before the New Jersey Supreme Court that the sole issue was petitioner's identity as one of the robbers. The jury acquitted on all three indictments.

At the second trial the only litigated issue was petitioner's participation, and the only evidence connecting him with the crime was once again Yager's testimony. Manifestly, the second trial was a resubmission of the same evidence upon the same issue which the first jury had decided against the State.

The State knew from the day of the holdup that Yager, the victim alleged in the second trial, had been robbed. As a result of the State's not indicting for his robbery, the possibility of joinder of all of the indictments was destroyed, and the second trial was delayed for 29 months.

Petitioner's conviction, which is based upon evidence so inherently weak that it has failed to convince 12 out of the 24 jurors who heard it, violates the principles underlying the requirement that the state must prove guilt beyond a reasonable doubt before it may deprive an individual of his liberty.

The trial and conviction destroys the principles underlying petitioner's right to a fair trial. A second trial of the same issue previously decided adversely to the state is inherently unfair because of the harassment by the dominant power of the state. More important, both the right to a fair trial and the right to a jury trial lose their value

as safeguards against erroneous conviction if the State is not bound by the findings in the first trial.

Universally accepted principles of *res judicata* and collateral estoppel would have prohibited a second trial in a civil suit. These fundamental principles of justice in civil cases are even more necessary in criminal prosecutions because of the disparity of resources of the parties, the greater emotional strain, the imprisonment awaiting trial if bail cannot be raised, and the more severe consequences of an erroneous decision.

Protection against multiple prosecutions has been recognized since early English law and is universally accepted today, usually in constitutional form. Essentially, two policies are involved:—prevention of harassment and prevention of erroneous convictions. *State* v. *Cooper*, 13 N.J.L. 361 (Sup. Ct.). The second policy is the rationalizing principle in many types of cases arising under the double jeopardy provisions. For instance, a man may not be prosecuted for the murder of A after an acquittal for the manslaughter of the same man; the state may not appeal, even in states having statutes allowing such appeals, the factual findings in the absence of legal error; nor may the state cause an unnecessary termination of the proceedings prior to verdict.

Petitioner's conviction violates both the policy against harassment and the policy against relitigation of the same fact. These are fundamental safeguards which are basic to our concept of a free society. Their nature is the same whether protection is provided by a broad definition of "offense" under the constitutional provisions or a realistic approach to collateral estoppel.

It is apparent that the State of New Jersey should not be allowed to evade these basic rights of an individual by

applying a combination of restrictive tests for determining the "same offense" and by refusing to go beyond the generality of the first verdict when its basis is so obvious.

The second trial is made even more shocking by the fact that the State delayed it for 29 months. The right to a speedy trial is an important part of the right to a fair trial which the state cannot arbitrarily destroy.

In conclusion, therefore, it may be seen that the refusal of the New Jersey Supreme Court to accept the obvious finding of the first jury has resulted in the destruction of principles underlying petitioner's right to be proved guilty beyond a reasonable doubt, his right to a fair trial, his right to a jury trial, his protection against harassment and retrial of the same fact, and his right to a speedy trial. Such a conviction shocks a fundamental sense of justice and is a denial of due process.

ARGUMENT

I

A Second Trial Deprives a Defendant of Due Process of Law Where, Under the Circumstances, It Violates a Sense of Fundamental Justice.

This Court will not allow a state conviction to stand if obtained in a manner which "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105; *Brown* v. *Mississippi*, 297 U.S. 278, 285. The opinion in *Palko* v. *Connecticut*, 302 U.S. 319, which was the first pronouncement by this Court upon the relationship between multiple trials and due process, relied upon this as the "rationalizing principle" of the due process cases. 302 U.S. at 325.

The opinion in *Brock* v. *North Carolina*, 344 U.S. 424, the latest case decided by this Court in which the state had two trials, applied this principle. The opinion stated that "the pattern of due process is picked out in the facts and circumstances of each case." 344 U.S. at 427-428.

II

Defendant's Acquittal in the First Trial Determined that He Was Not a Participant in the Robbery Alleged in the Second Trial, as All Indictments Alleged the Same Transaction, and Identity Was the Only Controverted Issue in the First Trial.

This Court has the power to examine the uncontroverted facts in the record and to draw its own conclusions therefrom where such conclusions have constitutional significance. *Fay* v. *New York*, 332 U.S. 261, 272; *Niemotko* v. *Maryland*, 340 U.S. 268, 271; *Plumber's Union* v. *Graham*, 345 U.S. 192, 197. The exercise of this power is necessary to determine if constitutional rights "have been denied in substance and effect" (*Oyama* v. *California*, 332 U.S. 633, 636) or are being defeated by "insubstantial findings of fact screening reality" (*Driver's Union* v. *Meadowmoor*, 312 U.S. 287, 293). The exercise of this power is particularly important in due process cases. *Watts* v. *Indiana*, 338 U.S. 49, 51.

The record shows that the victims in all four indictments were robbed at the same place and during the same transaction. Three men held up Gay's Tavern on September 20, 1950. The victims alleged at the first trial and Elmer Yager, the victim alleged at the second trial, were robbed in that holdup. The State admitted this by offering Yager's testimony in the first trial, for his testimony would otherwise be irrelevant. The trial judge recognized this in the first case, for he refused to dismiss the robbery charges

even though the only identification of petitioner was Yager's testimony (R. 87). The trial judge in the second trial also recognized this by correcting his sentence in that he set aside the consecutive sentence for carrying a concealed weapon (R. 8) because it was barred by the prior acquittal on similar counts in the first trial (R. 10). It is, therefore, clear that the same men who robbed the victims named in the indictments tried on May 26 and 27, 1952, also robbed Yager at the same time and place.

The State conceded before the New Jersey Supreme Court that the only litigated fact in the first trial was petitioner's participation in the robbery (R. 210).

The facts of the record are even stronger than the admission. Three indictments were joined for trial. Each indictment was supported by the unequivocal and uncontradicted statement by the victim named therein that he was put in fear (R. 21; 53; 55) and, as result, property was taken from his person (R. 21; 53; 54). These were the elements of the robbery alleged in the indictments (R. 1-3) and necessary for conviction under the statute (A. 33); *State* v. *McDonald,* 89 N.J.L. 421 (Sup. Ct.); affirmed 91 N.J.L. 233 (E. & A.), cited by the Superior Court in this case at R. 16. The testimony of each individual was corroborated by the equally unequivocal and uncontradicted testimony of four other victims. To have acquitted upon each of the three indictments, the jury would have had to discredit the testimony of each of the victims named in the indictments. The jury must have believed that each of the named victims and each of the corroborating witnesses, including Yager, was robbed during a holdup at Gay's Tavern on September 20, 1950. There was no evidence to the contrary.

The only issue common and conclusive to all three indictments was the participation of petitioner in the holdup.

Nor was this issue raised solely by his testimony of alibi. Of the State's five witnesses only Elmer S. Yager identified petitioner as a participant (R. 58) while three stated definitely that he was not (R. 46; 53; 55) and a fourth stated he could not swear to such an identification (R. 23).

The New Jersey Supreme Court, on the basis of the above record, said that the general verdict of not guilty did not establish the defendant's alibi (R. 207). Of course, the petitioner's contention before that Court and here is not that the verdict established that he was at his mother-in-law's home (though that evidence was uncontroverted except by the testimony of Yager), but that wherever he was, he was not at Gay's Tavern at the time of the robbery.

The view that the generality of a criminal verdict precludes the ascertainment of its basis was twice rejected by this Court in unanimous opinions. *Sealfon* v. *United States*, 332 U.S. 575; *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558. The significance of the verdict must be determined from a study of what took place at the trial in which it was rendered. *Sealfon* v. *United States*, *supra*; *Emich Motors Corp.* v. *General Motors Corp.*, *supra*. This is true in civil proceedings as well. *Fayerweather* v. *Ritch*, 195 U.S. 276, 307; 2 Freeman, Judgments, Sec. 765 (5th ed.). The conclusion as to the basis of a verdict is a question for the judge. *Emich Motors Corp.* v. *General Motors Corp.*, *supra*.

In petitioner's case the elements of the crime—e.g. the taking from the person by force or fear, are not in dispute. It has been shown by the record that these facts were proved overwhelmingly without any evidence to the contrary. It has been admitted by the State that there was no dispute at the trial as to the robbery of the named victims (R. 210). The sole disputed issue was petitioner's participation in the holdup of September 20, 1950, in Gay's Tavern.

At the second trial, Yager, the victim named in the indictment being tried, once again identified petitioner as one of the robbers in that same holdup. Once again his testimony was the sole evidence for the State on this issue. Once again petitioner testified as to alibi and this time the other four victims testified for defendant. Three stated petitioner was not one of the robbers and the fourth, once again, would not swear that he was.

In determining whether the second trial violates the due process clause, it is important to determine whether the state is attempting to retry an issue which was determined adversely to it in a prior decision on the merits. Cf. *Palko* v. *Connecticut,* 302 U.S. 319, 328. This question in a case such as this depends upon what issues were determined by the first acquittal.

The conclusion as to the meaning of the acquittal, based upon the uncontradicted facts, has constitutional significance and is for this Court to draw. *Watts* v. *Indiana,* 338 U.S. 49, 51. Any other procedure would allow the state to deny the defendant his rights in substance and effect, by insubstantial findings screening reality.

Justice Heher, in his dissent, which was joined in by Justice Brennan and Justice Jacobs, stated "there can be no doubt, I submit, of the issue submitted to the jury and the fact upon which the exculpatory verdict turned—i.e. the accused's participation in a holdup that was a conceded fact" (R. 209).

The petitioner, therefore, contends that it is manifest that the second trial in this case is an attempt by the State to overcome the adverse finding of the first jury upon an issue that is conclusive in both trials, by simply trying the same issue and the same evidence to another jury.

III

The Trial and Conviction of October 18 and 19, 1954, Under the Circumstances, Denied Petitioner of His Right to Due Process of Law.

The State knew from September 20, 1950, that Elmer S. Yager had been robbed (R. 157). However, no indictment for the robbery from his person was returned until July 17, 1952 (R. 10). This delay destroyed the possibility of settling the entire controversy against petitioner in one trial. The joinder of three indictments for the trial of May 26 and 27, 1952, shows that under New Jersey procedures, settlement in one trial was possible. Rule 2:4-15, now R.R. 3:4-7; Rule 2:5-4, now R.R. 3:5-6. These rules are set forth in the Appendix, p. 33.

The second trial, which was thus caused by the State, was based upon the fourth indictment to arise out of this one criminal transaction. The second trial was a relitigation of the question of defendant's participation in the robbery. Since Elmer S. Yager once again was the sole witness to identify the petitioner as one of the robbers, the second trial was not based upon any new evidence discovered after the first trial. It was an obvious attempt to overcome the first jury's finding by submitting the same evidence upon the same issue to another jury. The State on this trial, of course, knew from experience not to call eye-witnesses who had disappointed them in the first trial and, also, knew exactly how the defendant would testify. It is also significant that petitioner, an indigent who was unable to raise bail, was confined to the Bergen County Jail for five months while awaiting the trial of October 18 and 19, 1954 (R. 189) in spite of the first jury's determination that he was not one of the robbers in this transaction. The second trial was not an attempt by the State to obtain a "trial free from the corrosion of substantial

legal error", for it had had that in the first trial; it was an attempt "to wear out the accused by a multitude of cases with accumulated trials." *Palko* v. *Connecticut*, 302 U.S. 319, 328.

A. A conviction, after a prior acquittal upon the same evidence and issue, is not a reliable finding of guilt.

In Anglo-American society, where liberty is considered one of our most prized possessions, it has been universally accepted that the state is not justified in depriving an individual of his liberty unless guilt is shown with a high degree of certainty. The stigma of a criminal conviction and the deprivation of liberty following such a conviction have led to the requirement that the state prove a defendant guilty beyond a reasonable doubt. McCormick, Evidence, Sec. 321. As a result, it has been held to be a violation of due process to create a presumption in a criminal trial when it is not based upon a reasonable inference (*Tot* v. *United States*, 319 U.S. 463) or to accept less than a unanimous verdict of guilty. *Hibdon* v. *United States*, 204 F. 2d 834 (6th Cir.). The requirement of proof beyond a reasonable doubt has been described by Justice Frankfurter, dissenting in *Leland* v. *Oregon*, 343 U.S. 790, 803, as being "basic in our law and rightly one of the boasts of a free society" and as a "requirement and a safeguard of due process of law in the historic, procedural content of 'due process'."

Elmer S. Yager testified in the first trial as to petitioner's identity and was not believed. Nevertheless, petitioner is now undergoing incarceration of from five to seven years for a conviction based solely upon that same witness's previously unacceptable testimony. The dilemma was well stated in *People* v. *Grzesczak*, 77 Misc. Rep. 202, 137 N.Y. Supp. 538, in which relitigation of identity was not allowed

because "we would be confronted with two incompatible verdicts, which would amount to a finding on one hand that the defendant was not present, and on the other hand that he was present." See also *State* v. *Hopkins*, 68 Mont. 504, 219 Pac. 1106 wherein it was said that testimony not believed in the first trial could not be believed in the second. A conviction based upon evidence so inherently weak that it fails to convince 12 out of the 24 jurors who heard it does not refute petitioner's claim of innocence nor prove guilt with the requisite degree of certainty to justify conviction and deprivation of liberty.

The fact that this conviction is a totally unreliable indicator of guilt is not undermined by those cases allowing inconsistent verdicts by one jury after one trial. *Dunn* v. *United States*, 284 U.S. 390; *Dotterweich* v. *United States*, 320 U.S. 277. While it may be true that juries will convict upon only one count of an indictment because of compromise or leniency, the jury in the trial of May 26 and 27, 1952, acquitted upon all three indictments. Such a verdict was not a compromise nor may it be assumed that the jury was so lacking in its sense of responsibility as to have allowed the petitioner to go entirely free because of leniency.

B. The trial and conviction of petitioner is a violation of the principles underlying his right to a fair trial.

The right to a fair trial is an integral part of due process. The hearing must be before an impartial judge (*Tumey* v. *Ohio*, 273 U.S. 510) and the defendant must have counsel if a trial without one is unfair (*Powell* v. *Alabama*, 287 U.S. 45; *Betts* v. *Brady*, 316 U.S. 455; *Palmer* v. *Ashe*, 342 U.S. 134). In addition, the prosecution cannot make the hearing a sham by the knowing use of perjured testimony (*Mooney* v. *Holohan*, 294 U.S. 103) or by the knowing withholding of relevant evidence. *United States ex rel. Almeida* v. *Baldi*, 195 F. 2d 815 (3rd Cir.).

The second trial was caused by the State's knowing failure to indict. It was the second trial arising out of a single criminal transaction and the sole factual issue involved had been previously decided adversely to the State. Additional trials caused by deliberate harassment by the state are inherently unfair. The additional economic and psychological strain, the additional imprisonment awaiting trial, and the advantages of experience gained from the prior trial all tend to give the dominant power of the state an unfair advantage.

In both *Palko* v. *Connecticut*, 302 U.S. 319, and *Brock* v. *North Carolina*, 344 U.S. 424, the second trial was necessary to obtain a decision upon the merits. In *Palko* v. *Connecticut, supra*, the first decision was vitiated by legal error while in *Brock* v. *North Carolina, supra*, the first trial ended without a decision upon the merits because of the unavailability of evidence. The right of the state to have a decision in the case may overbalance the burden of a second trial to the accused where the first trial ended without a valid decision upon the merits, but no such necessity is involved in this case.

Also, the defendant's position in the *Palko* case was different from petitioner's position in the present case. In the *Palko* case, the defendant knew that a decision free from legal error would terminate the proceedings. If petitioner's conviction is allowed to stand, however, a defendant who finds himself in a similar situation has no assurance that a decision will terminate his ordeal. So long as there are other victims, a decision favorable to the defendant may be nothing more than a signal for another indictment and another trial.

More significant, perhaps, is that the concept of a fair trial requires recognition of those things which were actually decided. The right to a fair trial is an individual's

most basic safeguard against erroneous conviction. This characteristic of the right is destroyed if a defendant may be required to submit the same issue and the same evidence for decision in a series of trials. Even if such successive determinations could each be considered fair, which they cannot, eventual conviction regardless of guilt is the almost inevitable conclusion. *State* v. *Cooper*, 13 N.J.L. 361, 370-1 (Sup. Ct.); Slovenko, Double Jeopardy, 30 Tul. L. Rev. 409.

The same observation may be made about defendant's right to a jury trial, which was recently described as "one of our most vital barriers to governmental arbitrariness." *Reid* v. *Covert*, 354 U.S. 1, 10. In a recent article by Professor Slovenko it was said that "it would be useless to insist on jury trials if one could be tried over and over again, for eventually conviction will result" (Slovenko, Double Jeopardy, 30 Tul. L. Rev. 409).

The shocking nature of this conviction is emphasized when it is realized that the necessity for two trials was occasioned by the State's failure to utilize existing joinder procedures; that the defendant has no equivalent right to avoid the consequences of an adverse decision by the simple expedient of trying the same issue over again to another jury; and, that such a power on the part of the State destroys many of the individual's most cherished rights such as the right to require proof beyond a reasonable doubt, the right to a fair trial and the right to a jury trial.

C. Well established principles of justice would preclude relitigation between the same parties in a civil suit.

Judge Goodrich has stated that "the meaning of 'cause of action' for *res judicata* purposes is much broader today than it was earlier" and that the purpose of the modern rule is to establish that "the whole controversy between the parties may and often must be brought before the same

court in the same action." *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464, 469-470 (3rd Cir.). To the same effect, see Justice Brennan in *Ajamian* v. *Schlanger*, 14 N.J. 483, 485, 103 A. 2d 9, 10; Clark, Code Pleading, Secs. 19, 73; Moore, Federal Practice, Sec. 2.06.

Comment f. to Sec. 62 of the Restatement of Judgments is directly in point in relation to a civil trial. It states:

> "Where there are a number of successive acts which are substantially simultaneous or which, although occurring over a considerable period of time, are all substantially of the same sort, public convenience and *fairness to the defendant* may require that they be dealt with in one proceeding. Thus, where in a series of rapidly successive acts a person breaks into the house of another, beats him and takes his chattels, a judgment based upon a claim for any one of these harms is a bar to a subsequent action." (Emphasis added)

The state prosecutes punish a wrong to society. Here the social effects arose out of the same transaction, so the analogy to the civil rule is directly in point.

In addition, this expanding concept of a cause of action has been supplemented by universal recognition of collateral estoppel in civil proceedings. 2 Freeman, Judgments, Sec. 688 (5th ed.). In civil cases, it is recognized that the determination of what was decided is based upon a study of the record. If the question still remains unanswered, evidence may be taken to decide it. 2 Freeman, Judgments, Sec. 765 (5th ed.); Restatement of Judgments, Sec. 68, comment k. Justice Holmes described the doctrine of *res judicata* in civil cases as a "fundamental principle of justice". *United States* v. *Oppenheimer*, 242 U.S. 85, 88. The "fundamental principle . . . is that justice and public

policy alike demand that a matter . . . which has been solemnly adjudicated . . . shall be deemed finally and conclusively settled in any subsequent litigation between the same parties where the same questions arise". *Harding* v. *Harding,* 352 Ill. 417, 186 N.E. 152, 156. The doctrine is required by considerations of fairness to the defendant. Restatement of Judgments, Sec. 62, comment f.

Justice Holmes also said that it could not be "that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from liability in debt". *United States* v. *Oppenheimer,* 242 U.S. 85, 87. These fundamental principles of justice are infinitely more essential in criminal trials than in civil suits. The overpowering resources of the state; the imprisonment awaiting trial if, like petitioner, a person cannot afford bail; the stigma of the trial; the threat to freedom which makes the psychological and emotional strain far greater in a criminal trial; and, the unwarranted interference with freedom involved in an erroneous conviction which will almost inevitably follow repeated trials of the same issue: all demonstrate the greater urgency of protection in criminal trials than in civil suits. These factors demonstrate that this universally recognized principle of justice in civil suits is a basic and essential principle of justice in criminal trials, and is, therefore, protected by the due process clause.

D. The trial and conviction of petitioner violated the fundamental principles underlying the constitutional ban against multiple trials.

The protection against multiple prosecutions goes back to early English law. 3 Holdsworth, History of English Law, 611, 614; Note, 7 Brooklyn L. Rev. 79. The Fifth Amendment to the United States Constitution and the constitutions of all but five states provide protection against

double jeopardy. Those five states have adopted the protection as fundamental common law. Vinson, Ch.J., dissenting *Brock* v. *North Carolina,* 344 U.S. 424, 435; Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L. Rev. 317; Note, 24 Minn. L. Rev. 522, 523.

The reasons for the prohibition against multiple trials are twofold. The principle was characterized in *State* v. *Cooper,* 13 N.J.L. 361, 370-1 (Sup. Ct.) as "one of the strong bulwarks of liberty" which was necessary to protect individuals from "the unnecessary costs and vexations of repeated trials" and, in addition, to protect an innocent person from the risk "of an erroneous conviction from repeated trials." The first policy, therefore, is to prevent harassment by the state. This is essential because of the overpowering resources of the state, the stigma inherent in defending against criminal prosecutions, and the psychological strain which a defendant undergoes. The second policy is to prevent conviction of the innocent after a prior acquittal. This is based upon the realization that if a state can try the issue to enough juries, conviction is the almost inevitable consequence. Slovenko, Double Jeopardy, 30 Tulane L. Rev. 409. This policy is clearly applicable whenever the state attempts to litigate a second time an issue which has previously been decided adversely to it. The principle is the same whether or not the trials are for the same offense. *Grafton* v. *United States,* 206 U.S. 333; *State* v. *Labato,* 7 N.J. 137, 80 A. 2d 617.

The trial in this case violates both of the basic policies underlying the ban against repeated trials.

In early English law a prohibition against a second trial was effective in preventing the multiplication of suits arising out of one criminal transaction. Note, 65 Yale L. J. 339, 340-343. However, whether as a result of confusion between the problems of multiple trials and multiple pun-

ishment after one trial (Model Penal Code, Tent. Draft No. 5, pp. 36-37; Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L. J. 513, 514) or because of an attempt to counterbalance the then existent technical rules of criminal procedure which were favorable to the defendant (Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L. J. 513, 529; Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L. Rev. 317, 319) the courts came to adopt extremely narrow tests for determining what was the "same offense". The weakness of these tests is "that they are so narrowly drawn as not to afford any real protection against cumulation of the number of prosecutions". Model Penal Code, Tent. Draft No. 5, p. 35; Lugar, *supra,* at 344; Note, 65 Yale L. J. 339.

The New Jersey Supreme Court applied two tests to petitioner's case. It held first that since the evidence necessary to convict for the robbery of Yager would not be sufficient to convict for the robbery of one of the victims named under the first three indictments, the same evidence test did not prohibit a second trial. In addition it was held that since robbery necessarily involved two acts—e.g. the putting in fear and the taking from the person, and the second act was necessarily personal to the victim named in the indictment, the same act test was likewise unavailing to the petitioner (R. 205). Neither of these tests protects the individual from harassment by multiple trials or from constant retrial of the same issue until the state is ultimately victorious. A single holdup may be tried as many times as there are victims even though the only issue is unaffected by the victim's identity and identical evidence is submitted upon the same issue in each trial. Also, neither test takes into account the factual context out of which the indictments arose, or what actually took place at the first trial. It is obvious why the comments to the Model

Code used the Superior Court's opinion in petitioner's case, which applied the same two tests, as the example of the inadequacy of the protection presently afforded the individual. Model Penal Code, Tent. Draft No. 5, p. 35.

The relationship between the fundamental policies underlying the constitutional provisions against double jeopardy, and a rule of collateral estoppel which delves beneath the general verdict to a common sense appraisal of the realities of the trial, is apparent. Either a definition of offense sufficiently broad to encompass all of the known criminal consequences of a criminal transaction (Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L. Rev. 317, 347) must be adopted, or a realistic ban upon the retrial of the same fact must be established through collateral estoppel. Note, 65 Harvard L. Rev. 818, 874-875. Otherwise, a state may logically dissect one group of operative facts into a number of offenses and continue to try an individual upon the same issue until conviction, regardless of guilt, is achieved. It makes little difference to an individual which legal theory is utilized to preserve his fundamental rights when he is being overwhelmed by the power of the state.

Since the majority opinion in the New Jersey Supreme Court recognizes the applicability of collateral estoppel (R. 206-207), the precise difference between it and courts which have adopted a view of collateral estoppel based upon the facts of the first trial, is that the New Jersey Supreme Court circumvented the obvious finding of the first jury by hiding behind the generality of the verdict. In so doing, it relied upon two cases which do little to lend authority to its position. *People* v. *Rodgers*, 102 Misc. 437, 170 N.Y. Supp. 86, aff'd 184 App. Div. 461, 171 N.Y. Supp. 451, aff'd 226 N.Y. 671, 123 N.E. 882; *State* v. *Barton*, 5 Wash. 2d 234, 105 P. 2d 63. The trial court's statements

in the *Rodgers'* case were expressly held to be unnecessary to the decision on appeal. Nor was the *Barton* case "factually very close" to petitioner's case (R. 207). In the *Barton* case the record does not show the overwhelming proof of the elements of the offense, as this case does, nor does the *Barton* case show that the question of identity was raised by the testimony of four out of five of the state's own witnesses as well as by the defendant's testimony as to alibi. By their refusal to examine what actually took place and to make a common sense determination thereon, the New Jersey Court has limited collateral estoppel to those relatively rare instances wherein the general verdict, as such, is significant in the second trial—see, for example, *United States* v. *Simon*, 225 F. 2d 260 (3rd Cir.). This protection from continuous litigation is minimal.

The tests applied concerning double jeopardy and the reliance upon the generality of the verdict in relation to the question of collateral estoppel mean that petitioner's conviction was affirmed without ever considering the factual context which gave rise to the indictments or what took place at the first trial. Such abstract rationalizations are arbitrary. Whatever logic there may have been in limiting view on this type of question to a consideration of the common law record, it has been antiquated by the modern practice of keeping transcripts of judicial proceedings.

This Court has twice unanimously rejected the position of the New Jersey Supreme Court that the generality of a verdict in a criminal trial makes it impossible to ascertain the findings it is based upon. *Sealfon* v. *United States*, 332 U.S. 575; *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558. The government may not retry an issue which was decided adversely to it in the first trial. *United States* v. *Sealfon, supra; Harris* v. *State*, 113 Ga. 109, 17

S.E. 2d 573; *People* v. *Grzesczak*, 77 Misc. Rep. 202, 137 N.Y. Supp. 538. In both the *Harris* and the *Grzesczak* cases the defense of alibi was relied upon at the first trial and it was held that the acquittal in that trial precluded the state from trying the defendant for another offense arising out of the same transaction. In addition, the cases of *People* v. *Beltran*, 94 Cal. 2d 197, 210 P. 2d 238 and *State* v. *Dewey*, 206 Ore. 496, 292 P. 2d 799 also recognize the necessity of looking beyond the generality of the verdict to determine its effect.

The case of *United States* v. *De Angelo*, 138 F. 2d 466 (3rd Cir.), decided before this Court's opinion in *Sealfon* v. *United States, supra*, by Judges Jones, Goodrich and McLaughlin, goes further. In that case the defendant had previously been acquitted of the crime of robbery, and the Court of Appeals held that this prior acquittal estopped the government from showing his presence at the scene of the crime in a subsequent prosecution for conspiracy. Therefore it was error to refuse to allow the defendant to prove that participation in the holdup was a disputed issue in the first trial.

The prohibition against retrying the same fact is the rationalizing principle in other types of double jeopardy cases.

The relationship between the fundamental policy of the double jeopardy provisions and the prohibition against a second trial on the same fact is demonstrated by other types of cases arising under the constitutional ban. In *Grafton* v. *United States*, 206 U.S. 333, the defendant had been convicted of assassination in the Philippine civil courts after he had been acquitted of killing the same individual in a court-martial proceedings. In that case, Justice Harlan quoted with approval the test employed by the Philippine Supreme Court: "Does the first prosecu-

tion negative the facts charged in the second?" Justice Harlan also relied upon Chitty's statement that "it is sufficient if an acquittal of the one will show that the defendant could not have been guilty of the other". 206 U.S. at 350. The acquittal of Hoag in the first trial because he was not one of the men who robbed Cascio, Capezzuto and Galiardo effectively demonstrates that he was not one of the men who robbed Yager when all four victims were robbed by the same men.

The principle in the *Grafton* case is that there may not be a second trial for a greater offense if there previously has been an acquittal upon an indictment charging a lesser and included offense. This principle is generally recognized. *State* v. *Labato*, 7 N.J. 137, 146, 80 A. 2d 617, 621. For instance, an individual charged and acquitted of the manslaughter of A cannot subsequently be indicted and tried for the murder of A. To do so would be to allow the state to retry the same fact, and a verdict of guilty in the murder trial would be inconsistent with the prior acquittal. There is no difference in principle between this hypothetical and petitioner's case. The only difference is in the method of ascertaining the meaning of the prior acquittal. In view of the present availability of transcripts, this difference is no longer significant.

Nor may the state appeal a finding of fact, absent legal error, for the purpose of obtaining a new trial. *State* v. *Evjue*, 254 Wis. 581, 37 N.W. 2d 50. Wisconsin has a statute allowing an appeal by the State. In the *Evjue* case, the State, without claiming that any legal error was committed in the trial, sought review of the "ultimate determination of acquittal". In denying the right of the state to appeal this determination, the Wisconsin Supreme Court said that to allow such an appeal would be to open the door "to all of the evils sought to be obviated by the con-

stitutional and common law prohibitions against double jeopardy" because "the state could continue its appeals, if successful, until the ultimate decision of the tribunal was satisfactory to it." See also Model Penal Code, Tent. Draft No. 5, p. 48.

Although carried to a greater length, the principle is the same in cases in which the state has obtained a mistrial in the first proceedings. In such cases a second trial is prohibited unless the termination prior to verdict was necessary. The reason for this rule of necessity is the fear that the prosecution, foreseeing defeat at the hands of the first jury, will terminate the trial so that the same issues may be presented to another jury in the future. *State* v. *Locklear*, 16 N.J. 232, 236-37, 242, 108 A. 2d 436, 438, 442. Such a rule is far more drastic than the petitioner's position in this case, where the State has had a decision on the merits of the only issue in either trial.

It may be seen, therefore, that one of the fundamental and basic reasons for the constitutional prohibition of double jeopardy is to prevent relitigation of a factual issue previously decided adversely to the state. This reason extends beyond the confines of the restrictive tests for determining what is the same offense. Actually, the necessity of implementing this policy is increased by the narrow "same offense" tests because of the resultant possibility of increase in the number of trials which can be carved out of one set of operative facts. It is apparent, therefore, that the basic nature of this safeguard is not minimized by the courts' labelling it collateral estoppel in some instances and double jeopardy in others.

Petitioner contends that the State cannot deny him the protection of this basic right by ignoring the obvious finding of the first jury.

The fundamental character of the ban against retrial of the same fact by the state after an adverse decision is highlighted in cases such as petitioner's where there is no new evidence. To allow retrial under such circumstances undermines the cherished rights of the individual and destroys his traditional safeguards against erroneous conviction and governmental arbitrariness.

E. The second trial, in addition, deprived petitioner of his constitutionally protected right to a speedy trial.

The State knew from September 20, 1950, the day of the holdup, that Elmer S. Yager had been robbed (R. 156-157). In spite of this knowledge, no indictment was returned for the robbery of Yager until after the acquittal in the trial of May 26, and 27, 1952. Then, after the acquittal, New Jersey surrendered jurisdiction over petitioner by returning him to New York for incarceration (R. 202). It is significant that petitioner was returned to New York for "incarceration" (R. 202) and not to stand trial. He was imprisoned in New York for violation of parole (R. 189) under a 1948 conviction upon his plea of guilty (R. 166). It is, therefore, apparent that this is not a case where he faced possible trial in two jurisdictions.

In May, 1954, New Jersey regained the jurisdiction it had surrendered (R. 161). However, trial for the robbery of Yager did not take place until October 18 and 19, 1954. In the interim of five months between return and trial, petitioner, who was unable to raise bail, was in the Bergen County Jail (R. 189) in spite of the first jury's determination that he did not participate in the holdup. Therefore, as a result of the State's action, the second trial did not take place until 49 months after the robbery and 29 months after the first trial. This State induced delay makes the conviction still more shocking to a sense of justice.

The right to a speedy trial is protected by the United State's Constitution and by the constitution of forty states, including New Jersey. In addition, many states have statutes recognizing this right. Comment, 34 Tex. L. Rev. 1091. It is an essential element of the requirement of a fair trial (*United States* v. *Chase*, 135 F. Supp. 230 (N.D. Ill. E.D.)) and may neither "be frittered away by the laches of public officers" (*Ex Parte Trull*, 133 Kan. 165, 298 P. 775) nor precluded by the State's delay. *United States* v. *Provoo*, 17 F.R.D. 183 (D.C. Md.); *United States* v. *Chase, supra; People* v. *Prosser*, 309 N.Y. 353, 130 N.E. 2d 891.

The delay was prejudicial to the petitioner. In his alibi the petitioner testified that he was at his mother-in-law's home in New York on September 20, 1950 (R. 89, 162). In the interim between the two trials his mother-in-law died (R. 183). Nor can the State, having caused the delay, speculate that the defendant was not damaged because the attorney in the first trial, under the circumstances of that trial, did not call the mother-in-law. Since the only issue in the second trial was the presence of defendant at the robbery, it is apparent that petitioner was deprived of a potentially valuable witness by the State's election.

A speedy trial is essential to a fair trial not only because witnesses die, but also because witnesses forget. Petitioner, who testified as to alibi, testified that his lawyers contacted people who could substantiate his statements and they said it was so long ago that they could not remember (R. 188). It is true that such statements are self-serving, but this is normally true in such cases. The speculative nature of the damages, although it is common sense that such damages are real, is a sound basis for imposing the duty upon the State not to delay the trial purposely. *United States* v. *Provoo*, 17 F.R.D. 183 (D.C. Md.). Nor can the State rely

upon petitioner's incarceration in New York as an excuse for delay. The State had jurisdiction for the first trial, which would have been the ideal time to try the indictment. Having elected to delay, it must take the consequences of that delay. *United States* v. *Provoo, supra; United States* v. *Chase*, 135 F. Supp. 230 (N.D. Ill. E.D.).

Conclusion

The trial of October 18 and 19, 1954, was based upon the fourth indictment to arise out of one transaction. It was an obvious attempt to avoid the consequences of the first jury's decision that petitioner did not participate in the transaction. This the "prosecution may not do" (*Sealfon* v. *United States*, 332 U.S. 575, 580) because of the "plainest principles of justice" (Justice Heher, dissenting herein, R. 209).

The petitioner, in spite of the first jury's acquittal upon a fact which is conclusive upon all of the indictments including the one herein, was shuttled back and forth between New York and New Jersey at the State's will; he was confined to the Bergen County Jail for five months awaiting this trial; then, he was finally brought to trial over four years after the event and 29 months after his prior acquittal; and, in that belated trial he was convicted upon the testimony of the one man who had identified him in the first trial and who had not been believed at that time. All of this was done by the State without any semblance of justification. Even though the State could offer no justification, these actions were affirmed upon the basis of abstract formulae unrelated to the facts of the transaction or to the facts of the first trial. The State of New Jersey should not be permitted to avoid the constitutional safeguards of the individual by thus closing its eyes to reality.

Petitioner, as a result of this conviction, is being deprived of his liberty without due process of law. Petitioner, therefore, respectfully requests that the Judgment of the Bergen County Court in this case be reversed and that petitioner be released from confinement thereunder.

Respectfully submitted,

ROBERT E. KNOWLTON,
Counsel for Petitioner.

August 9th, 1957.

APPENDIX

New Jersey robbery statute in force during 1950.

New Jersey Statutes Annotated 2:166-1
Robbery; penalty

Any person who shall forcibly take from the person of another, money or personal goods and chattels, of any value whatever, by violence or putting him in fear, and his aiders, procurers and abettors, shall be guilty of a high misdemeanor, and punished by a fine not exceeding one thousand dollars, or imprisonment at hard labor not exceeding fifteen years, or both. (L. 1898, c. 235, Sec. 120, p. 827.)

New Jersey Rules of joinder in force during 1952.

Rule 2:4-15 Joinder of Offenses

Two or more offenses may be charged in the same indictment or accusation in a separate count for each offense if the offenses charged, whether high misdemeanors or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(Since September 9, 1953, Revised Rule 3:4-7.)

Rule 2:5-4 Trial of Indictments or Accusations Together.

The court may order two or more indictments or accusations to be tried together if the offenses and the defendants, if there is more than one, could have been joined in a single indictment or accusation. The procedure shall be the same as if the prosecution were under such single indictment or accusation.

(Since September 9, 1953, Revised Rule 3:5-6.)